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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL PEREZ MUNOZ, Defendant and Appellant.	G054141 (Super. Ct. No. 14WF0136) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick H. Donahue, Judge. Judgment affirmed.

Matthew A. Siroka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Daniel Perez Munoz, a self-proclaimed, 21-year-old gang member confronted ("hit up") Bob Huynh, a middle-aged man while he was walking through a darkened alley. Munoz stabbed Huynh with a knife, once in the neck and once in the chest. Huynh died at the scene. Several bystanders witnessed the stabbing. Munoz told the police, and later a jury, wildly conflicting stories as to what happened. The jury found Munoz guilty of first degree, premeditated murder.

Munoz argues the trial court committed three instructional errors. We find no errors. Munoz also argues that his counsel was ineffective because she did not request a mental impairment instruction. But if we assume counsel committed an error, we find that it was not prejudicial. Thus, we affirm the judgment and deny Munoz's related habeas corpus petition (G056940). (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

Finally, Munoz asks this court for a limited remand to allow him to apply for mental health diversion under a recent and newly amended statute. (Pen. Code, § 1001.36.)[1] But Munoz is statutorily ineligible for mental health diversion due to the murder charge. Thus, we deny Munoz's request for a remand.

I

FACTS AND PROCEDURAL HISTORY

On January 11, 2014, at about 7:15 p.m., Huynh walked out of his Garden Grove home. Huynh told his wife and family that he was walking to a nearby store to buy some beer. It was fairly dark outside. Huynh was 52 years old, weighed about 135 pounds, and stood at five feet, three inches tall. On his way home, Huynh took a shortcut through a darkened alley, just to the side of a motorcycle shop on Garden Grove Boulevard. Overlooking the alley is the West Creek Apartments, where a group of adults and children were attending a birthday party.

[1] Further undesignated statutory references will be to the Penal Code.

Abutting the apartment complex is an area known as "the wall" where several young men were hanging out. Munoz was among this group. Munoz was drinking Jack Daniels out of bottle. Munoz was 21 years old, six feet, one inch tall, and weighed about 285 pounds; his nickname is "Heavy D." Munoz claimed to be a "Playboys" gang member; he had several iconic Playboy images displayed on his phone and social media pages. Two days earlier, Munoz had posted on his Facebook page a picture of a black pocketknife emblazoned with a Playboy logo. Munoz showed the knife to his friends at the wall and said that he would stab someone with it. Munoz was wearing a black hoodie.

As Huynh was walking slowly in the alley, Munoz ran from the wall area towards Huynh, pulled his hoodie over his face, and yelled out, "Playboys." One of Munoz's friends started to follow him because, "Heavy D might do something stupid like stab that guy." When Munoz got to Huynh he asked him, "'Where you from?'" In gang culture, this is known as a "hit-up," or a challenge. Huynh said nothing in response and tried to walk away. Munoz pulled out his pocketknife and stabbed Huynh two times; once in the neck, and once in the chest. Huynh immediately collapsed to the ground.

Some of the birthday party attendees witnessed the stabbing and tried to aid Huynh, but he died at the scene. D. Benitez tackled Munoz to the ground as he tried to run away. Benitez was angry at Munoz for being disrespectful and stabbing someone in front of the children. Munoz begged Benitez to let him go, saying "he didn't mean to" and "'I'm sorry.'" Munoz was able to get away from Benitez just as the police were approaching the area. At some point, Munoz tossed his pocketknife to one of his friends.

Munoz fled the crime scene with M. Espinoza. Munoz told Espinoza that he was mad at Benitez for tackling him. Munoz said, "'I want to go back and take that fool down[.]'"

Police Investigation

Later that night, police arrested Munoz at his home, which was a few blocks from the crime scene. The police took Munoz to the station and began interviewing him at about 2:00 a.m. The interview was audio and videotaped; it was played for the jury during the trial.

After confirming his understanding of his constitutional rights, Munoz denied any involvement in the stabbing. Munoz said that he did not associate with any gangs. When asked if he knew any Playboy gang members, Munoz said, "I don't know nobody." When asked what occurred that night, Munoz said that he was at a bar with his friend Berto, short for Alberto, but Munoz did not know his last name.

When the police asked Munoz about the bar he responded in a rambling fashion: "Yeah, a bar. This was next to some Jon's Store. Jon's? I don't know and like a fast food restaurant, but I don't know the streets. He took me there and then from there, we started drinking and then he told me like, I told him oh, I want to go home already. He's like why? 'Cause I want to blaze it. He's like all right. Let's go then. He took one more shot of Jack Daniels and so we were driving, I was looking around to see like where's the place 'cause it was a nice bar and then from there, that's when we saw -- when we got to Beach and Garden Grove, that's when we saw the ambulance and a lot of cops and then we're like whoa, what the f*ck happened? And from there, I got home. I told him drop me off and that guy comes, you should run, you should run. Like why, what I did? And like I, if I did something wrong, you know, I'll confess but I never did nothing wrong."

Munoz denied that he had been wearing a black hoodie earlier that night. Munoz denied assaulting anyone. Munoz denied carrying a knife. Munoz denied being at the West Creek Apartments. Munoz denied being tackled. Munoz said, "they always blame it on me, like what the hell? Like why always me?" An investigator eventually told Munoz: "There are numerous people at that apartment complex. There are

numerous amounts of video cameras." The investigator asked, "What do you think is gonna happen when we pull those videos and you're on it?"[2] Munoz then said, "I just socked the guy."

Munoz told the police that "Marco was there with me." Munoz said that he "got frustrated at work" and after he left home "from there I went to the liquor store to buy a Jack Daniels and I started drinking. And then Marcos was there and he was like hey, let's come up on that faggot." Munoz said that Marcos was with him at the wall "because over there they hang out like in a group." Munoz said, "And then from there, that's when Marco's like let's go, let's go. You know, the other guy got to be down, you know, he gang bang does that sh*t." Munoz said that he had approached an Asian guy with Marcos, but "Marcos did all the talking. I was just like quiet. I was like all drunk, like oh, like what the f*ck?"

Munoz admitted hitting Huynh, but he denied stabbing him. Munoz said, "If I did it, I'll tell you I'll do it." Munoz described Marcos as "some tall guy, bald guy." Munoz said Marcos is Mexican, and his nickname is "Clumsy." Munoz said that Marcos does not have a car and, "he, um, he lives in the streets." Munoz said that Marcos was wearing "a black shirt and the black sweater and like he had black gloves." Munoz said that Marcos is a gang banger, but he didn't know which gang Marcos claimed.

Court Proceedings

On May 22, 2015, the Orange County District Attorney filed a one-count information charging Munoz with murder. (§ 187, subd. (a).) The information further alleged that Munoz had personally used a dangerous or deadly weapon. (§ 12022, subd. (b)(1).) The information did not allege a gang crime or a gang enhancement.

[2] There was apparently no video evidence of the stabbing.

In July 2016, the case was assigned to a courtroom for a jury trial. During a pretrial hearing, the prosecutor sought to introduce limited gang evidence for the sole purpose of demonstrating motive: "[Munoz] thinks that he's an associate or member of Playboys; he tells people that he is; he's putting it on his phone and on his Facebook; and then he acts in accordance with the thought processes of a gang member and hits somebody up and kills somebody." The court admitted the proffered gang evidence.

Gang Evidence

Garden Grove Police Department Investigator Peter Vi testified as the prosecution's gang expert. Vi testified that traditional Hispanic street gangs are territorial. Vi said that when gang members hang out it is important for the group to confirm that at least one person has a weapon. Vi testified that gang members generally identify themselves with symbols and often display their gang's symbols on social media. Vi said that the concept of respect is important in gang culture: "They use violence, intimidation, fear as a way to get a quick respect from either the enemies or nongang members." Vi testified that when a gang member yells out his gang's name prior to committing a violent act it is "to let the whole world know where he's from, who he's representing." Vi said that Playboys is a traditional Hispanic street gang.

Munoz's Trial Testimony

Munoz testified that on January 11, 2014, he had been working at a Tustin gas station. Munoz said that he got home around 4:00 p.m., took a shower, and then went out at about 5:30 p.m. Munoz testified that he brought a knife with him: "To protect myself." Munoz said that he walked to a liquor store, bought a bottle of Jack Daniels, and then headed to the West Creek Apartments: "Because I knew two people who lived there I hang out with." Munoz testified that he went to "the wall" but no one was there, so he walked into the apartment complex to find someone to hang out with.

Munoz said that he was drinking by himself when a man approached him; the man "was tall. I think he was light skin and he was wearing all black." Munoz testified that the man in black hit him up, but Munoz "ranked it" or acted like a coward. Munoz said that he hangs out with the Playboys gang and backs them up, but he is not a member. Munoz said that after he was hit up by the man in black, he returned to the wall and his friends were now there. Munoz testified he became drunk and the group of people he was with "were egging me on because everybody saw that person [Huynh] across the street." Munoz said that his friends were telling him "'Oh, can be a rival gang, careful. He's going to kill you,' or 'get ready. He's going to come get you.'" Munoz said it was dark and he thought Huynh was the man in black: "the same person who hit me up earlier."

Munoz testified that he ran towards Huynh and when he got to him "he was reaching for his pocket and he pulled something out, and from there, I reacted." Munoz said that he "pulled out my pocketknife that I had it and I accidentally stabbed him." Munoz testified that he "reacted to defend myself because I felt like my life was in danger. I felt like that person had a gun or a knife to try and kill me." Munoz said that after that, "I started walking back and realized that I made a mistake, it wasn't the same person that I thought it was." Munoz testified that his vision had been "fuzzy" during the stabbing, and then "when I started walking back away from the guy and my vision was coming good again."

On cross-examination, Munoz said that the man in black was taller than he is. When asked whether Huynh looked tall to him, Munoz said, "I can't remember." Munoz said he could not remember whether the man in black was young or old "because I was drunk." When pressed for further details, Munoz told the prosecutor, "You're turning me off." When asked if he yelled out "Playboys" as he ran toward Huynh, Munoz said, "I don't remember." Munoz said he did not remember what he did with the

knife. When asked if he was wearing a black hoodie, Munoz said, "I was wearing a sweater." Munoz described the sweater as black, with a zipper up the front and a hood.

When asked to reconcile his "fuzzy" vision with the precise stab wounds to Huynh's throat and chest, Munoz said, "It just happened quick." When the prosecutor confronted Munoz with his police interview, Munoz said that he only told the police two lies. When confronted with other details from the interview, Munoz told the prosecutor, "Now you're confusing me." Munoz eventually admitted that he told numerous lies to the police; Munoz also admitted that Berto and Marcos were just made up persons. When asked to explain why he did not tell the police that he was acting in self-defense, Munoz said, "At that time, I didn't know about the law or anything. Like I don't know that much." The prosecutor asked, "So someone educated you on the law?" Munoz responded, "I started reading on my own."

Further Defense Testimony

Dr. Kara Cross testified as a licensed clinical psychologist. Cross said that she had been contracted "to do a psychological and neuropsychological evaluation on" Munoz. Cross testified that she administered three standardized tests and reviewed Munoz's school records. Cross said that Munoz had attended special education classes. Cross discussed the general areas of the brain and their associated activities: the frontal lobe (judgment, reasoning, logic, problem solving); parietal lobe (processing); occipital lobe (vision); and temporal lobe (memory, speech).

Cross testified that based on the tests she had administered, Munoz's brain showed impairment "in the frontal lobe for judgment, reasoning, logic, processing, problem solving." Cross said that the tests showed impairment in the parietal lobe, indicating that "the brain's ability to communicate within itself to process information correctly was slowed beyond what would be expected for this particular individual." Cross testified that Munoz also showed impairment in memory and auditory speech

processing. Cross said that although Munoz graduated from high school, that information did not affect her findings: "Because [Munoz] was in a special education setting that was appropriate for him . . . ."

On cross-examination, Cross testified that she requested no further documents beyond Munoz's school records. Cross said that she interviewed Munoz, but no one else. Cross acknowledged that Munoz had passed a statewide standardized achievement test in order to graduate from high school (an exit exam), and that in his freshmen year he was an "A" student. When asked to identify Munoz's learning disability, Cross said that she "was not contracted to take measurements of a learning disability" but "it appears he has a specific learning disability for reading, . . . math, and there is a writing deficit." When asked if she could identify if Munoz had any kind of brain damage, Cross said that there were different types of brain imaging that "are medically available but they are not under the licensure of a licensed clinical psychologist."

Judgment and Sentencing

The jury found Munoz guilty of first degree murder and made a true finding that Munoz used a dangerous or a deadly weapon (a knife) in the commission of the murder. The court sentenced Munoz to 25 years to life, plus a one-year consecutive term for the weapon enhancement.

II

DISCUSSION

Munoz makes three claims of error regarding the trial court's obligation to properly instruct the jury. Munoz also contends that his trial counsel was ineffective because she failed to request a mental defense jury instruction. Munoz also asks this court to retroactively remand the matter for a mental health pretrial diversion hearing.

A. Instructional Error Claims (3)

We review instructional error claims de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We determine whether the trial court fully and fairly instructed the jury on the applicable law. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) When making this determination, we consider the instructions taken as a whole; we also presume jurors are intelligent people capable of understanding and correlating all of the instructions they were given. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

1. Voluntary Intoxication Instruction

Munoz argues that CALCRIM No. 625, the Judicial Council's pattern jury instruction on voluntary intoxication "misstated the law, because it prevented the jury from considering Munoz's voluntary intoxication as it relates to his defense of imperfect self-defense."

In 2018, the California Supreme Court held that the pattern jury instruction on voluntary intoxication correctly states the law: "CALCRIM No. 625 correctly permits the jury to consider evidence of voluntary intoxication on the question of whether defendant intended to kill but not on the question of whether he believed he needed to act in self-defense." (*People v. Soto* (2018) 4 Cal.5th 968, 970 (*Soto*).) The California Supreme Court's holdings are binding on all inferior state courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In this appeal, Munoz raises the same challenges to CALCRIM No. 625 that were raised in *Soto*, *supra*, 4 Cal.5th 968. Therefore, we reject Munoz's challenges under well settled stare decisis principles. (See *Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.) Indeed, Munoz recognizes that *Soto*, *supra*, 4 Cal.5th 968, is "binding on this court," but Munoz states that he is only raising his challenges to CALCRIM No. 625 in order to "preserve them for further review."

2. Mental Impairment Instruction

Munoz argues the trial court had a sua sponte duty to instruct the jury on mental impairment as a defense. (See CALCRIM No. 3428.)

A trial court has no sua sponte duty to instruct on mental impairment as a defense; however, the court must give the instruction upon request if it is supported by the evidence. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119 ["Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case . . . . [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte"].)

Here, Munoz did not request the mental impairment jury instruction, and the trial court was under no obligation to give the instruction sua sponte. (See *People v. Saille, supra,* 54 Cal.3d at p. 1119.) Thus, the court committed no instructional error. (See *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.) Alternatively, Munoz argues that his trial counsel was ineffective in failing to request the instruction, CALCRIM No. 3428. We shall address that argument later in this opinion.

3. Involuntary Manslaughter Instruction

Munoz argues the trial court erred by refusing his request to instruct the jury on involuntary manslaughter (CALCRIM No. 580) as a lesser included offense of the murder charge.

"The trial court has a duty to instruct the jury sua sponte on all lesser included offenses if there is substantial evidence from which a jury can reasonably conclude the defendant committed the lesser, uncharged offense, but not the greater." (*People v. Brothers* (2015) 236 Cal.App.4th 24, 29.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (See *People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8; but see

People v. Breverman (1998) 19 Cal.4th 142, 162 ["the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense"].)

A manslaughter (either voluntary or involuntary) is an unlawful killing without malice. (§ 192.) Malice, for the purpose of defining murder, may be express or implied. (§ 188.) It is express "when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature." (§ 188, subd. (a)(1).) "Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188, subd. (a)(2).)

Voluntary manslaughter is an *intentional killing* (but without malice) that occurs "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant [*intentionally*] killed a person because he acted in imperfect [unreasonable] self-defense." (CALCRIM No. 571, italics added.) Involuntary manslaughter is an *unintentional* killing that occurs "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) That is, involuntary manslaughter is an *unintentional* killing that occurs during the commission of one of three types of predicate acts: a misdemeanor offense, a lawful act, or a felony that is not inherently dangerous. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006.)

Here, at the close of the evidence Munoz requested an involuntary manslaughter instruction on the theory that he committed a "misdemeanor assault with a deadly weapon." Relying primarily on *People v. Parras* (2007) 152 Cal.App.4th 219, 227 (*Parras*), the trial court denied Munoz's request for the involuntary manslaughter instruction, finding that "what we have here is . . . not a misdemeanor but an aggravated felony assault with a deadly weapon, being the knife in this case." We agree with the trial court's analysis.

In *Parras*, *supra*, 152 Cal.App.4th at page 221, a woman's badly beaten body was found in her apartment. The victim's death was caused by multiple injuries, apparently inflicted with a portable radio: "Her injuries included a compound fracture to her jaw, four teeth being knocked out, and 12 to 15 distinct head wounds." (*Id*. at p. 228.) Years later, defendant admitted to police that he was having an affair with the victim and that he last saw her at her apartment. (*Id*. at p. 223.) At trial, defendant testified that he did not recall hitting the victim with anything other than his hand; he claimed he did not intend for her to die. The trial court did not instruct the jury on involuntary manslaughter on the specific theory that the killing occurred during the commission of a misdemeanor. (*Id*. at p. 227.) The Court of Appeal agreed with the trial court's ruling. (*Id.* at p. 219.) The court reasoned that if the homicide occurred during the commission of a crime, the undisputed evidence (the victim's injuries) showed that the crime was a felony assault and not a misdemeanor battery. (*Id*. at p. 228.) "If this homicide occurred during the commission of another criminal offense, that offense was a felony, not the misdemeanor required under this theory." (*Ibid*.)

The same rationale in *Parras* applies here. Munoz testified that he *intended* to stab Huynh in order to save his own life. The undisputed evidence also showed that Munoz inflicted two stab wounds with a pocketknife, one stab wound to Huynh's neck, and another stab wound to his chest. If Huynh's homicide occurred during the commission of an act, it was an assault with a deadly weapon (a felony); it was not a misdemeanor assault, or any type of lawful act. Thus, the trial court properly refused to instruct the jury on involuntary manslaughter as a lesser included offense.

Munoz argues that his intoxicated state, his "confused and contradictory testimony," and his sole statement at trial that he "accidentally" stabbed Huynh provides sufficient evidence to support involuntary manslaughter. We disagree.

While Munoz's testimony was at times contradictory, his consistent defense was that he acted in imperfect self-defense (voluntary manslaughter). That is, his defense

was that he acted *intentionally*, but unreasonably. We find that no reasonable juror could have found Munoz's one reference to an "accident" persuasive, given the totality of the eyewitness testimony and undisputed evidence. (See *People v. Barton*, *supra*, 12 Cal.4th at p. 201, fn. 8 ["Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive"]; see also *People v. Breverman*, *supra*, 19 Cal.4th at p. 162 ["the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense"].)

4. Cumulative Prejudice

Finally, Munoz argues that the cumulative prejudicial effect of the court's alleged three instructional errors require reversal.

"In theory, the aggregate prejudice from several different errors occurring at trial could require reversal even if no single error was prejudicial by itself." (*In re Reno* (2012) 55 Cal.4th 428, 483.) However, the rejection of each of a defendant's individual claims "cannot logically be used to support a cumulative error claim [where] we have already found there was no error to cumulate." (*Ibid*.)

In short, since we have found Munoz's three individual claims of instructional error to be without merit, there is no prejudice to aggregate.

B. Ineffective Assistance of Counsel

Munoz argues that his trial counsel was ineffective because she failed to request a jury instruction on mental impairment as a defense. (CALCRIM No. 3428.)

A criminal defendant has a right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 685-686 (*Strickland*).) To establish a violation of this right, a defendant must show: 1) counsel's performance "fell below an objective standard of reasonableness" under "prevailing professional norms"; and 2) this resulted in prejudice to the defendant. (*Id.* at pp. 687-688, 691-692.)

As to prejudice, "the question is whether there is a reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland*, *supra*, 466 U.S. at p. 695.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215.) A reviewing "court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697.)

Generally, evidence of a defendant's mental capacity is irrelevant outside of an insanity trial because "diminished capacity" is not a defense to any crime. (§ 25, subd. (a).) However, evidence of a defendant's "mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (§ 28, subd. (a).) CALCRIM No. 3428 explains this concept to the jury: "You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime."

Here, Munoz's trial counsel submitted a declaration, which was attached to Munoz's petition for a writ of habeas corpus. Counsel states: "As part of my representation of Mr. Munoz, I presented evidence to support a mental defect defense in the hopes of securing a manslaughter verdict." Counsel avers: "I inadvertently neglected to ask for the mental defect instruction – CALCRIM No. 3428. I had no strategic or tactical purpose in failing to request the instruction. On the contrary, I wanted that instruction as an integral part of the defense."

Here, if we assume that counsel's failure to request the mental impairment instruction constituted error, we do not find that this error resulted in prejudice. (See *Strickland*, *supra*, 466 U.S. at p. 697.) The trial court properly instructed the jury on the lesser included crime of voluntary manslaughter (imperfect or unreasonable self-defense). (CALCRIM No. 571.) But because the jury found Munoz guilty of first degree murder, the jurors necessarily agreed that Munoz killed Huynh with premeditation and deliberation. That is, the jury's finding of first degree murder is wholly inconsistent with a finding that Munoz acted in imperfect or unreasonable self-defense due to an alleged mental impairment.

Further, the evidence of Munoz's premeditation and deliberation was persuasive and overwhelming, while the evidence of Munoz's alleged unreasonable self-defense was implausible and uncorroborated. Huynh was a much smaller and older man. Independent witnesses saw Munoz run across an alley towards Huynh before yelling out his gang name, "Playboys." The witnesses then saw Munoz "hit up" and stab Huynh in the neck and chest without provocation. This eyewitness testimony was wholly inconsistent with Munoz's self-serving trial testimony that he feared the mysterious man in black, who allegedly turned out to be Huynh. And Munoz's trial testimony was entirely at odds with his earlier statements to the police about Berto and Marcos.

Moreover, even if the jury believed Munoz's improbable trial testimony, the jury was properly instructed that: "Imperfect self-defense does not apply when the defendant, through his own wrongful act, has created circumstances that justify his adversary's use of force." (CALCRIM No. 571.) Again, Munoz ran across the street toward Huynh while he was under no immediate threat or fear.

Finally, the psychologist's testimony was somewhat irrelevant. She did not testify that Munoz suffered from a specific mental disease or defect. Therefore, Munoz's mental impairment defense was without any credible evidentiary support. (See CALCRIM No. 3428 ["You have heard evidence that the defendant may have suffered

from a mental (disease[,]/ [or] defect[,]/ [or] disorder)"].) In sum, it is not reasonably probable that Munoz would have received a more favorable verdict had counsel requested, and had the court then provided, the mental impairment instruction.

C. Request for Mental Health Pretrial Diversion

Munoz requests that we "order a limited remand to allow him to apply for mental health diversion pursuant to newly enacted Penal Code section 1001.36."

Effective June 27, 2018, the Legislature created a pretrial diversion program for defendants who suffer from mental disorders and meet the criteria specified in the statute. (§ 1001.36, subd. (b), added by Stats. 2018, ch. 34, § 24.) If a defendant meets these criteria, the trial court may postpone criminal proceedings to allow the defendant to undergo mental health treatment. (§ 1001.36, subds. (a), (c).) If the defendant performs satisfactorily in diversion, the trial court must dismiss the criminal charges. (§ 1001.36, subd. (e).)

On September 30, 2018, about three months after section 1001.36 was enacted and became effective, the Legislature amended the statute to exclude defendants who have been charged with murder, voluntary manslaughter, rape, and other registerable sex offenses. (§ 1001.36, subd. (b)(2), added by Stats. 2018, ch. 1005, § 1.) The amendment became effective approximately three months later, on January 1, 2019. (See Cal. Const., art. IV, § 8, subd. (c), par. (1); Gov. Code, § 9600, subd. (a).)

In a matter of first impression, a different panel of this court held that mental health diversion under section 1001.36 applies retroactively to defendants whose cases were on appeal when the statute became effective. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 790 (*Frahs*), review granted Dec. 27, 2018, S252220, depublication requests denied, citing *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).) Every appellate panel that has considered the issue has agreed with *Frahs*, except one. (See *People v. Craine* (2019) 35 Cal.App.5th 744, 757.)

However, in this case we need not revisit whether section 1001.36 applies retroactively. Assuming the law applies retroactively, Munoz is not entitled to relief because he is categorically excluded from diversion under the statute as now amended. Again, a defendant is not eligible for diversion if he or she is charged with certain offenses, including murder. (§ 1001.36, subd. (b)(2)(A).) Thus, assuming that section 1001.36 applies retroactively, Munoz could not benefit from the statute.

Munoz argues that he should enjoy the benefit of section 1001.36 as initially enacted, which did not exclude defendants charged with murder. We disagree.

"'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.'" (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308.) "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. . . . This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Estrada, supra,* 63 Cal.2d at p. 745.)

In order to apply the former unamended section 1001.36 retroactively under *Estrada,* we would have to infer that the Legislature determined that the lack of mental health diversion for defendants charged with murder was too severe a penalty. But the current amendment to section 1001.36 forecloses that inference. The amendment specifically excludes defendants charged with murder from the possibility of mental health diversion. We may therefore infer that exclusion from mental health diversion is

not too severe a punishment for Munoz. (See accord, *People v. McShane* (2019) 36 Cal.App.5th 245, 334 [a defendant charged with murder is not entitled to a remand for mental health diversion under the amended statute].)

Munoz also argues that applying the current amended section 1001.36, rather than the former unamended version, would violate the federal and state prohibitions on ex post facto laws. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) Again, we disagree.

"A statute violates the prohibition against ex post facto laws if it punishes as a crime an act that was innocent when done or increases the punishment for a crime after it is committed." (*People v. White* (2017) 2 Cal.5th 349, 360.) The ex post facto prohibition ensures that people are given "fair warning" of the possible punishment they may be subjected to if they violate the law; they can rely on the meaning of the statute until it is explicitly changed. (*Weaver v. Graham* (1981) 450 U.S. 24, 28-29, 32, fn. 17.)

On January 11, 2014, Munoz murdered Huynh. On that date, the possibility of mental health diversion did not exist (the earlier version of section 1001.36 became effective on June 27, 2018). Consequently, Munoz could not have relied on the possibility of pretrial mental health diversion when he committed the crime of murder. Moreover, the Legislature's amendment of the statute to eliminate murder as eligible offense (effective January 1, 2019), did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for any crime. Thus, Munoz has not established an ex post facto violation.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

GOETHALS, J.